Supreme Court, U. S.
FILED
JUL 15 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-682

SANTA CLARA PUEBLO, *et al., Petitioners,*

v.

JULIA MARTINEZ, *et al., Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF OF THE NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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CONSENT TO FILING OF BRIEF AMICUS CURIAE

Petitioners and Respondents have consented in writing to the filing of this brief. Copies of such consents have been filed with the Clerk.

INTEREST OF THE NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION AS AMICUS CURIAE

The National Tribal Chairmen's Association (NTCA) is a voluntary, non-profit organization com-

posed of the chief officers of reservation Indians or federally recognized Indian tribes with federal trust lands or with members who live on or near federal reservations having a local governing entity. Approximately 190 federally recognized tribes having a population of around 90 percent of the approximately 800,000 American Indians are represented in NTCA.

The purpose of NTCA, as an official voice of American Indian leaders, is to encourage the preservation of Indian cultures and to promote economic, political, and social progress among Indian people. NTCA endeavors to ensure that the historic trust relationship between the United States and reservation Indians is not impaired or terminated and to protect the human and natural resources of Indian reservations and of federally recognized tribes.

The Tenth Circuit has held that the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-03 (1970), authorizes federal judges to decide how sovereign Indian tribes should determine who is eligible for tribal citizenship. As spokesman for the reservation-based and federally recognized Indian tribes of this country, NTCA must challenge such a disastrous inroad into tribal sovereignty.

NTCA has a vital interest in preserving the right of federally recognized, quasi-sovereign tribes to select their own memberships and to preserve their social and religious structures, disparate though they be from Anglo-American structures. The tribes have developed differing requirements for citizenship because of different cultural, economic, and geographic backgrounds.

The issue here, whether, in a tribe that prohibits all adoptions, children of a "mixed" marriage in which

the father is an alien must be accorded tribal membership because children of a "mixed" marriage in which the father is a tribal member are accorded membership, rests on a striking facet of Santa Claran tradition predating the Spanish conquest.[1] Under the guidance of elders, the father, not the mother, is charged with the non-delegable duty of teaching his children the Pueblo's history and tradition and of instructing the child in its religion and in its ceremonial rites. This crucial duty, performance of which is essential for the Pueblo's cultural survival, cannot, or so the Pueblo believes, be performed by a father reared in an alien atmosphere nor by the mother acting as surrogate father.

NTCA's interest is to ensure that all tribes retain the power to define their own society, to determine their own membership and identity, for if a tribe's "ability to do this is limited or restricted by an external authority, then a new definition of what it is to be a Santa Claran is imposed, and the culture of Santa Clara is inevitably changed." Op. of District Court in this case, 402 F. Supp. 5, 15.

Petitioners have and will emphasize the particular facts associated with this litigation. NTCA, however, as a collective voice of Indian leadership, stands in position to present the Court with the broad ramifications inherent in the decision to be reached. All Indian tribes, all Indian people, will be touched.

The Tenth Circuit decision, both on jurisdiction and on the merits, opens the door to constant, debilitating

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[1] The Santa Clara reservation has been at its present location, approximately 25 miles north of Santa Fe, New Mexico, for at least 300 years. Pet. for Cert., at 7.

federal litigation that will exhaust the tribes financially and, if permitted to stand, will open tribal legislative decisions, made for societies unlike the Anglo-American, to United States judicial supervision under United States standards. This would make dual citizenship a sham and would undo much of the good accomplished by the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-79 (1970), designed to give federally recognized tribes considerable self-government.

SUMMARY OF ARGUMENT

Jurisdiction of this declaratory judgment-injunction action was contested below on the theory that the complaint failed to state a cause of action. We suggest that the courts below, and this Court, lack jurisdiction because the Indian Civil Rights Act provided that the only means for its judicial enforcement would be by habeas corpus. This contention, although not argued below, is open here. *Liberty Mutual Ins. Co. v. Wetzill,* 424 U.S. 737, 740 (1976).

The courts below implied jurisdiction on the theory that if habeas corpus was the only legal remedy, then portions of the law were not judicially enforceable, a result they believed Congress did not intend. However, that conclusion is untenable because in all other civil rights acts Congress has created sweeping, specific remedies. Where a statute creates a right and provides a specific remedy (habeas corpus in this case), that remedy is exclusive. Federal district courts have only such jurisdiction as Congress, rightly or wrongly, confers on them. *Palmore v. United States,* 411 U.S. 389, 395-96 (1973); *Cary v. Curtis,* 44 U.S. (3 How.) 236, 246 (1845); 1 Moore's Federal Practice ¶ 0.60[2], [3]

(2d ed. 1976). *See Califano v. Sanders,* 97 S.Ct. 980 (1977).

Going to the merits:

Shining through the Tenth Circuit opinion is an abhorrence of any gender-connected discrimination. Because the United States, commencing with the nineteenth amendment in 1920, has engaged in a steady program of obliterating distinctions between the sexes, the court tested the Indian statute at bar in the light of that Anglo philosophy which is wholly alien to many Indian philosophies, Santa Claran philosophy included.

Moreover, the court engaged, improperly we suggest, in independent fact-finding. Where the district court had found factually that the Santa Claran society was patrilineal and patrilocal, the court of appeals swept such findings aside as "conclusory characterizations." 540 F.2d at 1047. The fact is, those "characterizations," while stated in terms of art, are based upon solid, uncontradicted evidence. (See attached Appendix).

The court of appeals oversimplified and misstated the issue by stating the disputed ordinance drew "its classification lines on the basis of sex," whereas, in fact, deeper cultural interests were at stake; gender, per se, was not the origin of the ordinance. The distinction and classification is one between progeny of a native Santa Claran father and progeny of a father who is an alien to the Pueblo.

In 1939, the Santa Clara Pueblo faced a serious problem. Because of an increase in "mixed" marriages, more and more cultural outsiders lived within the

Pueblo community. Before the 1930's, "mixed" marriages were rare. When a Santa Claran woman had married a non-Santa Claran, the family was expected to, and usually did, live in the husband's community; the children would not become citizens of the Pueblo. This rule was not inflexible, however, and in the exceptional instances where a non-Santa Claran male desired his family to reside in the Pueblo, such residence was allowed. Further, if the alien proved himself worthy in the traditional way, it was possible for him and his children to become naturalized citizens of the Pueblo. Such a decision was reached on an ad hoc basis, but the Santa Clarans had a history of jealously guarding their identity.

In 1935, the Pueblo adopted its Constitution and Bylaws and set out to solve the problem of naturalization. In 1939, it passed its membership ordinance, under which there have been no naturalizations, male or female. This ordinance also dealt with the sensitive problem of mixed marriages.

The ordinance denies membership to children of women who marry aliens, but extends membership to children of men who do so. The key teaching of the Pueblo's traditions and way is the responsibility of the father. The mother's role in teaching the children "how to be Santa Clarans" is minimal. Thus, the ordinance is logical: If the father is Santa Claran, he can inculcate Santa Clara tradition; but if the father is a cultural outsider, he probably will not understand the Pueblo and will teach his children an alien way. The cultural impact of a non-Santa Claran mother on the tribe is minimal; the cultural impact of a non-Santa Claran father can be devastating.

The Tenth Circuit assumed the power to sit in judgment over Pueblo tradition and custom. It is the only court to have done so. The court held, in effect, that Pueblo culture manifested in the ordinance was not "compelling," thereby placing a higher burden of showing the validity of Indian legislation than is imposed on states or on the federal government.

Membership ordinances are the principal way in which Indian tribes define themselves as distinct communities within the American system. Since the Indian Reorganization Act, Congress has respected and encouraged the rights of Indian tribes to exist freely as self-governing peoples. *Morton v. Mancari,* 417 U.S. 535, 542, 553 (1974). The relationship between the federal government and tribal governments is a delicate, fragile one. The judiciary should not intervene to make federal Indian policy without clear warrant from Congress.

ARGUMENT

I. FEDERAL COURTS HAVE NO JURISDICTION TO ENTERTAIN PRIVATE. CIVIL CAUSES OF ACTION BROUGHT BY INDIVIDUALS AGAINST INDIAN TRIBES ALLEGING A VIOLATION OF THE INDIAN CIVIL RIGHTS ACT.

Jurisdiction was pleaded under both the Indian Civil Rights Act, 25 U.S.C. § 1302(8) (1970), and the Civil Rights Act of 1948, as amended, 28 U.S.C. § 1343 (1970). The latter statute appears not to have been relied on by either the district court or by the Tenth Circuit and begs the question because it provides only that:

> The district courts shall have original jurisdiction of any civil action *authorized by law to be commenced by any person. . . .* 28 U.S.C. § 1343 (1970) (emphasis added).

The Tenth Circuit assumed the power to sit in judgment over the tradition and culture of the Santa Clara Pueblo. However, by section 1302 Congress only granted federal courts the power to hear petitions for a writ of habeas corpus. Nevertheless the court felt it had authority to settle any complaint alleging a violation by an Indian tribe of the Indian Civil Rights Act.

Precedents over the last two centuries that limit federal jurisdiction to matters clearly delineated by Congress and that recognize the sovereign immunity of Indian tribes from suit were ignored. There is no statutory language that even remotely encourages this result.

The Act and the legislative background demonstrate that Congress intended a limited enforcement role for federal courts under the Act and that Congress at no time intended to require Indian tribes to defend their diverse and unique cultures to the federal judiciary.

A. The Indian Civil Rights Act Neither Explicitly Nor Implicitly Provides Federal Courts With Jurisdiction To Hear Private, Civil Causes of Action.

In the absence of an express grant by Congress, federal courts have no jurisdiction to settle intratribal controversies. *Native American Church of North America v. Navajo Tribal Council,* 272 F.2d 131 (10th Cir. 1959); *Martinez v. Southern Ute Tribe of Southern Ute Reservation,* 249 F.2d 915 (10th Cir. 1957), *cert. denied,* 356 U.S. 960 (1958). The Indian Civil Rights Act (ICRA), 25 U.S.C. §§ 1301-03 (1970), empowers federal courts only to issue a writ of habeas corpus to protect any person unlawfully detained by an Indian tribe. 25 U.S.C. § 1303 (1970).

The ICRA contains no other explicit grant of jurisdiction over challenges to official actions by Indian tribal governments. *See* 25 U.S.C. §§ 1301-03 (1970); *Califano v. Sanders,* 97 S.Ct. 980, 984 (1977).

Nevertheless, the Tenth Circuit, relying upon its previous decision in *Dry Creek Lodge,*[2] held that it had jurisdiction to entertain Mrs. Martinez's claim. In *Dry Creek Lodge,* the Tenth Circuit had held that section 1302 of the ICRA implicitly granted federal courts the power to entertain a cause of action alleging a deprivation of equal protection of the laws.[3] NTCA strongly asserts that the implication of federal civil remedies against Indian governments is without warrant. If such remedies are to be created, only Congress, not the courts, can create them. Note, *Implication of Civil Remedies Under the Indian Civil Rights Act,* 75 MICH. L. REV. 210 (1976).

This Court on many occasions has followed the familiar canon of statutory construction that "where a statute creates a right and provides a special remedy, that remedy is exclusive." *Renegotiation Board v. Bannercraft Clothing Co.,* 415 U.S. 2, 18 (1974); *United States v. Babcock,* 250 U.S. 328, 331 (1919). The statutory language here demonstrates that Congress intended that only habeas corpus review of tribal actions be available under the ICRA.

The legislative history supports this construction of the Act, for Congress intended only a limited role for the federal courts in the enforcement of the ICRA.

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[2] *Dry Creek Lodge, Inc. v. United States,* 515 F.2d 926 (10th Cir. 1975).

[3] 515 F.2d at 933. The court recognized that several other courts had found jurisdiction under 28 U.S.C. section 1343(3). *Id.*

Ziontz, *In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of the Indian Civil Rights Act,* 20 S.Dak. L. Rev. 1, 13 (1975). During its consideration of the ICRA, Congress focused on tribal administration of justice and the procedural rights of those charged with offenses before tribal courts; the legislators afforded much less attention to the specifics of tribal structure. *Wounded Head v. Tribal Council of Oglala Sioux Tribe of Pine Ridge Reservation,* 507 F.2d 1079, 1082 (8th Cir. 1975); *Groundhog v. Keeler,* 442 F.2d 674, 682 (10th Cir. 1971); Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments,* 82 Harv. L. Rev. 1343, 1356, 1359 (1969).

As originally introduced, the Act authorized appeals of *criminal* convictions from tribal courts to federal district courts, with trials de novo on appeal. *See* S. 962, 89th Cong., 1st Sess. (1965). Nowhere in the legislative record is there any suggestion that Congress ever remotely considered extending this right of appeal to civil cases. Ziontz, *In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of the Indian Civil Rights Act,* 20 S.Dak. L. Rev. 1, 10 (1975). The de novo criminal review provision was considered thoroughly during hearings and was stricken. The testimony revealed two major objections to this provision: Additional burden on the already overworked federal courts was feared,[4] and undue interference with the tribal law and order systems was stressed.[5] When S. 1843, which eventually became the

[4] *E.g., Hearings on S. 961-68 and S.J. Res. 40 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary,* 89th Cong., 1st Sess., at 19 (1965) (Remarks of Mr. Frank J. Barry, Solicitor, Dep. of Interior).

[5] *E.g., id.* at 66 (Remarks of Mr. Arthur Lazarus).

ICRA, was introduced, the bill provided only for habeas corpus review of tribal detentions. S. 1843, 90th Cong., 1st Sess. (1967).

The legislative record indicates that Congress interpreted the bill to mean just what it said: Federal courts have jurisdiction only to review petitions for a writ of habeas corpus.

The primary spokesman supporting the ICRA in the House, Representative Ben Reifel, considered the Act's purpose to be "to create a Bill of Rights for the protection of Indians tried by tribal courts, and to improve the quality of justice administered by tribal courts." 114 Cong. Rec. 9111 (1968). *See also id.* at 9112, 9552-53. During hearings on the effect of the ICRA, chaired by Senator Sam Ervin in 1969, Senator Ervin interpreted the Act thusly:

> This bill does not provide for the Federal courts to review all the decisions of the Indian courts. In fact, provision for Federal review was in there originally, and at the request of a number of tribes we eliminated it entirely. *The only provision in this bill that provides for Federal court interference is writ of habeas corpus,* and that probably exists as law now, although I am not quite certain. If the man was convicted in violation of a law, the Federal court would have the jurisdiction to issue a writ of habeas corpus. I don't imagine there would be too many of those.

Hearing on Title II of the Civil Rights Act of 1968 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess., at 15 (1969) (emphasis added).

There is no indication in the legislative record that Congress intended to subject all actions taken by tribal

governments to review by federal courts in civil actions. Surely if Congress had intended such a reversal of established practice, there would at least have been some discussion of this remarkable turnabout. *See Native American Church of North America v. Navajo Tribal Council,* 272 F.2d 131 (10th Cir. 1959); *Martinez v. Southern Ute Tribe of Southern Ute Reservation,* 249 F.2d 915 (10th Cir. 1957), *cert. denied,* 356 U.S. 960 (1958). This circumstance is especially telling when one recognizes that every major civil rights act contains a jurisdictional provision enabling federal courts to hear cases brought under it. Ziontz, *In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of the Indian Civil Rights Act,* 20 S.DAK. L. REV. 1, 27 (1975). Congress knows how to provide federal courts with jurisdiction to enforce its civil rights acts. Congress did so in the ICRA, intentionally limiting the federal courts to review of unlawful detentions by tribal governments. The courts are bound by this congressional judgment. *See Califano v. Sanders,* 97 S.Ct. 980 (1977); 1 MOORE'S FEDERAL PRACTICE ¶ 0.60[2], [3] (2d ed. 1976).

Some have argued, however, that to deny individuals a general right to question tribal practices in federal courts would be to interpret the ICRA as extending to individuals rights without remedies. *See* Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments,* 82 HARV. L. REV. 1343, 1371 (1969).

This simply is not the case.

The many executive and legislative actions taken by a tribe that are subject to review by the Secretary of the Interior must comply with the ICRA; otherwise,

the Secretary's approval would be invalid under the Administrative Procedure Act, which requires that agency action be in accordance with federal statute. *See* 5 U.S.C. § 706(2)(A) (1970). If a tribal action is not subject to Secretarial review, the proper forum in which to assert one's rights under the ICRA is in tribal court.

It is ethnocentric in the extreme to assume that federal courts are the only tribunals capable of protecting those individual rights guaranteed by the ICRA. Indian people, as Congress repeatedly has found, are competent to govern themselves. *See e.g.,* Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450-450n (Supp. V 1975); Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-79 (1970). The Santa Claran Council is as able as a federal judge to understand the anguish of Mrs. Martinez and is better able to evaluate it in light of the Pueblo's concerns.

In sum, we suggest that the courts below mistakenly created jurisdiction to hear this case. It is crucial that Congress granted federal jurisdiction *only to issue writs of habeas corpus.* The legislative record supports the express legislative language: Congress has *not* provided individuals with a general right to challenge tribal actions in federal court. The courts are bound by this legislative decision.

B. Congress Did Not Intend To Waive Indian Tribes' Traditional Immunity From Suit When It Passed the Indian Civil Rights Act.

Each Indian tribe begins its relationship with the federal government as a sovereign, with powers subject to qualification only by treaties and by express congressional legislation; what is not expressly limited

remains within the domain of tribal sovereignty. *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 559-61 (1832); *Groundhog v. Keeler,* 442 F.2d 674, 678 (10th Cir. 1971); F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122-23 (U.N. Mex. 1971). *See also United States v. Mazurie,* 419 U.S. 544, 556-57 (1975). It is because of this sovereignty that this Court long has recognized that an Indian tribe is immune from suit without consent. *Puyallup Tribe, Inc. v. Department of Game of Washington,* 45 U.S.L.W. 4837, 4839 (U.S. June 23, 1977); *United States v. United States Fidelity & Guaranty Co.,* 309 U.S. 506, 512-13 (1940); *Turner v. United States,* 248 U.S. 354, 358 (1919). Such consent must be explicit. *Dicke v. Cheyenne-Arapaho Tribes, Inc.,* 304 F.2d 113, 114 (10th Cir. 1962).[6]

The Tenth Circuit has neglected these principles. There is nothing in the language of the Act or in its legislative background to indicate that Congress intended to waive the immunity of Indian tribes from suit that has been recognized officially since 1895. *See Thebo v. Choctaw Tribe of Indians,* 66 F. 372 (8th Cir. 1895). Nevertheless, the court of appeals observed that "to the extent that the Indian Civil Rights Act applies, tribal immunity is thereby limited." 540 F.2d at 1042. This lifting by bootstraps is contrary to the principle that a waiver of tribal immunity must be explicit; it also ignores completely the effect of Title IV of the ICRA, 25 U.S.C. 1321-26 (1970). Title IV represents an attempt by Congress to correct the flaws of the assimilationist policy embodied by Public Law 280,

[6] The *Dicke* ruling is consistent with the decisions by this Court holding that a waiver of sovereign immunity by the United States, *United States v. Shaw,* 309 U.S. 495, 500-01 (1940), or by a state, *Edelman v. Jordan,* 415 U.S. 651, 673 (1974), must be express.

§ 7, 67 Stat. 590 (1953), by providing for future assumption of criminal and civil jurisdiction by the states over Indian reservations within their respective boundaries only with the consent of the Indian tribe. 25 U.S.C. §§ 1321(a), 1322(a), 1326 (1970); *Kennerly v. District Court,* 400 U.S. 423, 429 (1971).

It is inconceivable that Congress in the same statute expressly recognized the sovereign power of an Indian tribe to refuse to relinquish civil jurisdiction over its territory, but by unnecessary implication abrogated the power of a tribe to withhold its consent to a civil cause of action in federal court. *Cf. Morton v. Mancari,* 417 U.S. 535, 548 (1974.)

The doctrine of tribal immunity remains a part of the law not only as a recognition of inherent Indian tribal sovereignty, but also to protect the financial existence of Indian governments. Indian tribes cannot afford to defend constantly their laws, cultures, and traditions in federal court. Congress did not express any intention that this Court allow such a challenge to tribal existence, and this Court should infer none.

II. THE INDIAN CIVIL RIGHTS ACT, WHICH PROVIDES THAT NO INDIAN TRIBE SHALL DENY THE EQUAL PROTECTION OF ITS LAW, IS QUITE DIFFERENT FROM THE FOURTEENTH AMENDMENT'S PROHIBITION OF STATE ACTION DENYING EQUAL PROTECTION OF THE LAWS. THE INDIAN CIVIL RIGHTS ACT, ALTHOUGH IT IS SIMILAR, DID NOT TRANSPLANT THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION ONTO INDIAN TRIBAL GOVERNMENTS.

Overlooked below, and we believe to be of determinative significance if this Court reaches the merits of the controversy, is that the equal protection provision of

the Indian Civil Rights Act *assumes the validity of Indian ordinances* enacted for a culture different from that of the United States and requires only that *those* laws, not *ours,* be applied equally.

The pueblos of Santa Clara [7] belong to the Tanoan linguistic stock,[8] and, more specifically, to the Northern Division of the Tewa Group.[9] The Tewa are Eastern pueblos and differ from the Western pueblos chiefly in their attitudes toward moiety and clan. Parsons, *The Kinship Nomenclature of the Pueblo Indians,* 34 AMERICAN ANTHROPOLOGIST 377, 380 (n.s. 1932). "Among the Tewa the patrilineal moiety is the paramount principle of social organization." *Id.* at 378. Among the Western pueblos, there is but a trace of moiety; those non-Tanoan pueblos are characterized by a clanship system that is matrilineal. *Id.* at 377.

In the traditional Tewa system, membership in the moiety, and, therefore, in the tribe, comes through the father. Ellis, *supra* note 8, at 33a.

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[7] "Pueblo," a Spanish word meaning "village" or "town," is a general term that was applied by the Spaniards, and later adopted by English-speaking people, to describe Indians who live in permanent stone or adobe houses built into compact communities in southern Colorado, central Utah, New Mexico, and the adjacent Mexican Territory. J. SWANTON, THE INDIAN TRIBES OF NORTH AMERICA 339 (Smithsonian Bur. of Amer. Ethnology, Bull. 145, 1952); F. HODGE, HANDBOOK OF NORTH AMERICAN INDIANS 318 (Smithsonian Bur. of Amer. Ethnology, Bull. 30, 1910).

[8] Pueblo Indians belong to four distinct linguistic stocks: Hopic, Zunian, Keresan, and Tanoan. *Id.*; Ellis, *The Pueblo Social Organization as Basis for Rules of Tribal Membership, printed in,* Brief of The Pueblo De Cochiti, *et al.,* in Support of Pet. for Cert., App. K, at 22a-23a.

[9] There are three groups of the Tanoan stock: Tewa, Tiwa, and Towa. Ellis, *supra* note 8, at 23a.

The Santa Clara Pueblo has not significantly changed its social organization in the last 95 years. (App., at 8a.) This community of approximately 1,200 people has so far successfully managed to withstand the constant pressures exerted by 210 million alien-Americans. Without question, the cohesive social, ceremonial, and political organization of the Pueblo has been responsible for this survival. E. DOZIER, THE PUEBLO INDIANS OF NORTH AMERICA 18 (N.Y. 1970). The membership ordinance under attack preserves the Santa Claran culture by ensuring that children will be brought up in the traditional way, with the father imparting to his children the tribal customs and religion. Congress, when it passed the ICRA, did not intend to weaken the bonds that will enable the Pueblo to exist as a distinct community 95 years from today. *Cf. Morton v. Mancari,* 417 U.S. 535, 553 (1974). It is for the Santa Clarans to decide for themselves, without assistance from the federal judiciary, how to preserve their unique way of life. Congress, through the ICRA, insists only that the tribal government administer its policies fairly and equally, which it has. (App., at 3a.)

The equal protection clause of the fourtenth amendment to the U.S. Constitution does not restrain the exercise of power by a tribal government. *See Talton v. Mayes,* 163 U.S. 376 (1896); *Wounded Head v. Tribal Council of Oglala Sioux Tribe of Pine Ridge Reservation,* 507 F.2d 1079, 1081 (8th Cir. 1975); *Native American Church of North America v. Navajo Tribal Council,* 272 F.2d 131, 134-35 (10th Cir. 1959). *But see Colliflower v. Garland,* 342 F.2d 369 (9th Cir. 1965). Nevertheless, the Respondents, Br. in Opp. to Cert., at 9, and the Tenth Circuit below, 540 F.2d at 1047, assert

that fourteenth amendment precedent should form a "persuasive guide" to courts that consider challenges to tribal law under the equal protection clause of the ICRA, 25 U.S.C. § 1302(8) (1970). This is mere dialectical sleight of hand that leads to the same oppressive result. Respondents would reach a result Congress never intended.

The Respondents premise their contention on the asserted "identical" wording of the two equal protection clauses. Br. in Opp. to Cert., at 9. The Tenth Circuit appeared to share this view that Congress merely transplanted the equal protection clause of the fourteenth amendment onto the ICRA. 540 F.2d at 1044. However, this premise is incorrect, for Congress in the ICRA *did not apply the equal protection guarantee to the tribes verbatim*. The ICRA provides that "[n]o Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of *its* laws. . . ." 25 U.S.C. § 1302(8) (1970) (emphasis added).

The fourteenth amendment, however, states that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of *the* laws." U.S. Const. amend. XIV, § 1 (emphasis added).

That this modification in the language was intentional is supported by the legislative record. For example, in its endorsement of S. 1843, the Interior Department's substitute bill that later became the ICRA, the Senate subcommittee stated:

> The Department of Interior's bill would, in effect, impose upon the Indian governments the same restrictions applicable presently to the Federal and State governments with several notable exceptions, *viz*, the 15th amendment, certain procedural requirements of the 5th, 6th and 7th amendments, and, *in some respects*, the equal protection requirement of the 14th amendment.

Staff of Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 89th Cong., 2d Sess., Report on Constitutional Rights of the American Indian, at 25 (Comm. Print 1966) (emphasis added). *See Wounded Head v. Tribal Council of Oglala Sioux Tribe of Pine Ridge Reservation*, 507 F.2d 1079, 1082 (8th Cir. 1975); *Groundhog v. Keeler*, 442 F.2d 674, 682 (10th Cir. 1971).[10]

The meaning of the equal protection clause of the ICRA seems clear: A tribe must exercise its powers in such a way that applies "its" laws equally to all persons within the tribe's jurisdiction. This guarantee does not authorize a federal judge to review the wisdom of the tribal law in question. Tribal representatives were consistently assured by Congress that the equal protection guarantee would only require that tribal law be administered fairly; it would not call into question tribal law itself. *E.g., Hearing on Title II of the Civil Rights Act of 1968 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess., at 19, 40 (1969) (Remarks of Sen. Ervin).

This "equal application" approach to the ICRA equal protection guarantee has been adopted by every

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[10] Thus, the Tenth Circuit below was mistaken when it concluded that the legislative record revealed "no limitations" were placed on the incorporation of the equal protection clause into the ICRA. *See* 540 F.2d at 1044.

Circuit that has interpreted section 1302(8), except, of course, the Tenth Circuit. In *Crowe v. Eastern Band of Cherokee Indians, Inc.*, 506 F.2d 1231 (4th Cir. 1974), the Fourth Circuit considered equal protection and due process challenges against the tribe alleging an unlawful assignment by the tribe of part of the plaintiff's lands. *Id.* at 1232. The court concluded:

> Under the Indian Civil Rights Act the plaintiff was entitled to the right of procedural due process incident to the division of her father's possessory holdings, as well as the even-handed application of the tribal customs, traditions and any formalized rules relative to tribal land. . . . The Act, however, did not empower the court to go further and substitute its judgment on the merits for that of the Tribe.

Id. at 1237.

A battery of decisions by the Eighth Circuit reflect a similar approach to that taken by the Fourth Circuit in *Crowe*.[11] The Eighth Circuit has held that where a tribe has a "sufficient cultural interest" underlying its action, the equal protection requirement of the fourteenth amendment should not be embraced within the ICRA; only uniform application of tribal law should be required. *Daly v. United States*, 483 F.2d 700, 705-06 (8th Cir. 1973). Where Indian tribes had adopted Anglo-Saxon democratic processes for selection of

[11] *Means v. Wilson*, 522 F.2d 833 (8th Cir. 1975), *cert. denied*, 424 U.S. 958 (1976); *Wounded Head v. Tribal Council of Oglala Sioux Tribe of Pine Ridge Reservation*, 507 F.2d 1079 (8th Cir. 1975); *Brown v. United States*, 486 F.2d 658 (8th Cir. 1973); *Daly v. United States*, 483 F.2d 700 (8th Cir. 1973); *White Eagle v. One Feather*, 478 F.2d 1311 (8th Cir. 1973); *Lefthand v. Crow Tribal Council of Crow Tribe of Indians of Montana*, 329 F.Supp. 728 (D. Mon. 1971).

tribal representatives, however, the Eighth Circuit applied the one man-one vote principle as a necessary concomitant of the election process. *Id.* at 704-05. *See Means v. Wilson*, 522 F.2d 833, 839 (8th Cir. 1975), *cert. denied*, 424 U.S. 958 (1976). The reconciliation of these two lines of decisions was made clear by the court in *Wounded Head v. Tribal Council of Oglala Sioux Tribe of Pine Ridge Reservation*, 507 F.2d 1079 (8th Cir. 1975). There the court held, *inter alia*, that the equal protection clause of the ICRA does not provide a basis for a federal court to enjoin a tribal council from preventing 18- to 21-year-old tribal members from voting in tribal elections. *Id.* at 1083. The ICRA, the court found, provided it no license to force an "alien culture" on an Indian tribe. *Id.* If a tribe adopts voting procedures that exactly parallel those found in American culture and that do not involve "such complexities as tribal membership or blood lines," however, the Eighth Circuit does not deem it a significant interference with any important tribal value to require a tribe to treat equally votes cast by its members. *Id.* But a court cannot use the ICRA to enfranchise a new class of the tribal population. *Id. See Daly v. United States*, 483 F.2d 700, 705-06 (8th Cir. 1973). The Ninth Circuit, in *Howlett v. Salish and Kootenai Tribes of Flathead Reservation, Montana*, 529 F.2d 233 (9th Cir. 1976), adopted the Eighth Circuit interpretation of the equal protection clause of the ICRA. *Id.* at 238-39.

Under this equal application approach, it is clear that the Santa Clara ordinance governing tribal citizenship is consistent with the equal protection guarantee of the ICRA. The Eighth Circuit decisions make clear that federal courts should not seek to conform

tribal membership requirements, which are based on Indian cultures, to the mandates of Anglo-Saxon culture, and they have been so applied. *Yellow Bird v. Oglala Sioux Tribe of South Dakota,* 380 F.Supp. 438 (D.S.D. 1974). The district court here also applied the Fourth, Eighth, and Ninth Circuit precedent, holding that the ICRA does not invalidate a tribal membership ordinance when the challenged classification is grounded on criteria that have been traditionally employed by the tribe in considering membership questions. 402 F.Supp. at 17-18. It is for the tribe, not a federal judge, to determine which traditional values will promote cultural integrity. *Id.* at 18. The role of the judiciary is only to ensure that tribal policies are administered fairly and equally. *See id.* at 17.

The Tenth Circuit did not hesitate to re-evaluate the tribal citizenship policy of the Santa Clarans in the light of its concept of fourteenth amendment law. The court thought it "persuasive" that the fourteenth amendment invalidates gender-based classifications. 540 F.2d at 1046-47. The court subjected the tribe's ordinance to a "compelling" interest standard, *id.* at 1047, which this Court has refused to apply to gender-based distinctions drawn by the states and by the federal government. *E.g., Craig v. Boren,* 97 S.Ct. 451, 457 (1976); *Stanton v. Stanton,* 421 U.S. 7 (1975); *Weinberger v. Weinberger,* 420 U.S. 636 (1975). Not surprisingly, the Tenth Circuit held that the tribe's membership ordinance could not withstand its strict scrutiny. 540 F.2d at 1047-48.

The Tenth Circuit's analysis should not be allowed to stand. First, assuming the crucial distinction at bar is gender-based, it is incongruous in the extreme to restrict the tribe under the ICRA to a greater extent

than the states and the federal government are restricted by the fourteenth amendment. *See Means v. Wilson,* 522 F.2d 833, 841 (8th Cir. 1975), *cert. denied,* 424 U.S. 958 (1976); *Wounded Head v. Tribal Council of Oglala Sioux Tribe of Pine Ridge Reservation,* 507 F.2d 1079, 1083 (8th Cir. 1975); Note, *Equal Protection Under the Indian Civil Rights Act: Martinez v. Santa Clara Pueblo,* 90 HARV. L. REV. 627, 629-30 (1977).

The distinction between classes here, however, is not per se a gender distinction, but is a distinct classification of alien fathers as opposed to native fathers. It cannot be denied that the tribe has a legitimate governmental purpose, perhaps a religious purpose, in promoting and protecting the education and training of its members. Under the historical Santa Clara pattern of political, social, and religious training it cannot be imparted by an alien father.[12] The Santa Clarans permit aliens, male and female, to live among them, but they do not permit the progeny of alien fathers to become citizens. The admission of aliens into citizenship of any nation, we respectfully suggest, is a matter of privilege, not of right. *United States v. Ginsbery,* 243 U.S. 472, 474, 475 (1919).

This country, although it has always encouraged immigration and naturalization, has often regulated same through imposition of restrictions, prohibitions, and quotas too numerous to mention. *See United States v. Wong Kim Ark,* 169 U.S. 649 (1898). Authority of

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[12] The anthropologist Alfonso Oritz, of the Tewa San Juan Pueblo, has presented a classic study of the complex, traditional way of acculteration in the Tewa pueblos. A ORTIZ, THE TEWA WORLD: SPACE, TIME, BEING, AND BECOMING A PUEBLO SOCIETY (Chi. 1969).

the government of the United States, through the action of the legislative department, to restrict aliens from its territory is a proposition that is not open to controversy. *Chae Chan Ping v. United States,* 130 U.S. 581, 603-04 (1889)." In fact, "over no conceivable subject is the legislative power of Congress more complete than it is over" the admission of aliens. *Oceanic Steam Navigation Co. v. Stranahan,* 214 U.S. 320, 339 (1909). Moreover, after Mr. Justice Frankfurter suggested, in *Galvan v. Press,* 347 U.S. 522, 530 (1954), a deportation case, that "much could be said for the view" that due process places some limitation on congressional power in this area "were we writing on a clean slate," he continued:

> But the slate is not clean. As to the extent of the power of Congress under review, there is not merely "a page of history" . . . but a whole volume. Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. . . . *But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government.* . . .

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[11] *See also e.g., Shaughnessy v. United States ex rel. Mezei,* 345 U.S. 206, 210 (1953); *Mahler v. Eby,* 264 U.S. 32, 40 (1924); *Keller v. United States,* 213 U.S. 138, 143-44 (1909); *United States ex rel. Turner v. Williams,* 194 U.S. 279, 294 (1904); *Fok Young Yo v. United States,* 185 U.S. 296, 302 (1902); *Ekiu v. United States,* 142 U.S. 651, 659 (1892). *Cf. Graham v. Richardson,* 403 U.S. 365, 377 (1971).

> We are not prepared to deem ourselves wiser or more sensitive to human rights than our predecessors, especially those who have been most zealous in protecting civil liberties under the Constitution, and must therefore under our constitutional system recognize congressional power in dealing with aliens. . . .

Id. at 531-32 (emphasis added). *Kleindienst v. Mandel,* 408 U.S. 753, 766-67 (1972).

Furthermore, in *Kleindienst v. Mandel,* 408 U.S. 753 (1972), this Court again reaffirmed these general principles in the context of not permitting an alien to enter the United States in accord with executive discretion in direct contravention to conceded first amendment rights of United States citizens.

We see no reason that the deference accorded the legislative and executive branches of the federal government in the area of execution of immigration and naturalization policies should not form a "persuasive guide" to the judiciary when attempting to decide upon the validity of the quasi-autonomous Santa Clara Pueblo citizenship policies. *See* F. COHEN, HANDBOOK of FEDERAL INDIAN LAW 133-37 (U.N. Mex. 1971).

More fundamentally, however, if a federal court decides to second-guess tribal membership policy, due respect must be afforded the tribe's underlying interests. Courts, without exception, have held that the ICRA is not co-extensive with the equal protection clause of the fourteenth amendment. *E.g., Howlett v. Salish and Kootenai Tribes of Flathead Reservation, Montana,* 529 F.2d 233, 237 (9th Cir. 1976); *Wounded Head v. Tribal Council of Oglala Sioux Tribe of Pine Ridge Reservation,* 507 F.2d 1079, 1082 (8th Cir. 1975);

Groundhog v. Keeler, 442 F.2d 674, 682 (10th Cir. 1971). These courts have acknowledged that the legislative history of the ICRA reflects an intent to protect the individual rights of Indians, while fostering tribal self-government and cultural identity. *E.g., Howlett v. Salish and Kootenai Tribes of Flathead Reservation, Montana,* 529 F.2d 233, 238 (9th Cir. 1976); *Wounded Head v. Tribal Council of Oglala Sioux Tribe of Pine Ridge Reservation,* 507 F.2d 1079, 1082 (8th Cir. 1975); *Crowe v. Eastern Band of Cherokee Indians, Inc.,* 506 F.2d 1231, 1237 (4th Cir. 1974). Thus, a court that reviews the merits of a tribal ordinance should warily be guided by fourteenth amendment precedent because the interests of states and the federal government underlying a classification only rarely can be equated with the tribal interests underlying a similar classification. A court must determine whether the tribal classification rationally furthers a legitimate tribal interest.

The district court below found as a fact that the challenged classification is "rooted in . . . traditional values." 402 F.Supp. at 16. The Santa Clara Pueblo's patrilineal and patrilocal tradition survives. *Id.* Citizenship flows only through the father, not the mother. The father teaches the child how to grow up a Santa Claran, not the mother. To the Santa Claran, it is the cultural background of the father that is all-important. That the appellate judges do not find these traditions to be "compelling" is not important; they are rational; it is sufficient that the Santa Clarans, as a self-governing people, have decided to embody these traditions in their membership code.

The 1939 ordinance in no way reflects a society that discriminates against women. As the anthropologist Elsie Clews Parsons demonstrated:

> Distinctions of sex are marked in the Pueblo in culture, in dress, in occupations, and in the ceremonial life. The distinctions are a matter of division of functions between the sexes rather than of subordination of one sex to the other. The house and all the activities which center in the house appertain to women, the outside or public life to men. Even when women share in the public ceremonial life, their roles follow lines of domestic concerns, e.g., providing food for the fetiches . . . and for the ritual impersonators, the priests, the doctors.

Parsons, *The Kinship Nomenclature of the Pueblo Indians,* 34 AMERICAN ANTHROPOLOGIST 377, 378 (n.s. 1932). (See App., at 7a-8a.)

The appellate court derided the Pueblo's ordinance as "the product of economics and pragmatics." 540 F.2d at 1047. But the district court found as a fact that the ordinance fostered the economic survival of the tribe. 402 F.Supp. at 15. This Court has recognized the importance of a tribal economy in the preservation of a self-determining tribal society. *E.g., Williams v. Lee,* 358 U.S. 217 (1959). The needs of any Indian tribe to define itself and to preserve its culture and economy undoubtedly justify the Santa Clara Pueblo's membership criteria. Note, *Equal Protection Under the Indian Civil Rights Act: Martinez v. Santa Clara Pueblo,* 90 HARV. L. REV. 627, 629 n. 27 (1977).[14]

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[14] The Tenth Circuit also thought it important that the challenged ordinance was passed as late as 1939. 540 F.2d at 1047. The court apparently did not realize that the laws of most Indian tribes

This case presents this Court with the fundamental question of whether Indian tribes truly should be allowed to survive in the United States as culturally distinct, self-governing peoples. As has been mentioned, it is clear that Congress now follows a policy that fosters this tribal self-determination and that the ICRA furthers, rather than hinders, this policy. There is no indication that Congress intended to vest federal courts with the power to sit in judgment over Indian traditions and cultures, or, as the Tenth Circuit did, decide which traditions are necessary to the survival of Santa Claran culture and which are not. 540 F.2d at 1047-48. Courts should not arrogate to themselves this awesome authority without clear and express direction from Congress. This is especially true of membership ordinances, which, as the district court found, provide "a mechanism of social, and to an extent psychological and cultural, self-definition." 402 F.Supp. at 15. Each tribe has its own culture; each tribe defines itself in its own way. Uniform membership guidelines simply cannot be drawn.

Federal courts have no power to decide which tribal traditions should be perpetuated and which should not.

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were not written until Congress passed the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-79 (1970). *See* Burnett, Jr., *An Historical Analysis of the 1968 Indian Civil Rights Act*, 9 HARV. J.LEG. 557, 577 (1972). The Santa Clara Pueblo adopted its written Constitution and Bylaws under the Act in 1935, Pet. for Cert., at 8, and adopted the present ordinance within four years. This ordinance has remained unchanged since enactment and was found by the district court to have been based on traditional tribal membership policies in practice before the formal written rule was established, 402 F.Supp. at 18. The Tenth Circuit was incorrect in its belief that the challenged classification "is of relatively recent origin . . . ." 540 F.2d at 1048. (See App., at 1a, 4a, 5a-6a, 7a, 8a.)

Under the ICRA, courts are mandated only to ensure that these criteria, whatever they may be, are applied fairly and equally. The district court found that the Santa Claran membership policies, like those of other tribes, provide the means by which the Santa Claran culture can survive while surrounded by an alien culture. It would be bitter irony if the principles of the alien culture were used to destroy the distinctiveness of the various tribal cultures now existing precariously within this country. This only Congress can do.

CONCLUSION

We respectfully suggest that both courts below were wrong in holding they had jurisdiction. They created, judicially, a jurisdiction that Congress did not give them. This assumed jurisdiction would subject Indian tribes to a constant flow of litigation attacking this, that, or the other facet of Indian culture. The Tenth Circuit Court of Appeals gravely erred by, in effect, holding that the United States Constitution rather than tribal governments should determine who shall be members of Indian tribes.

We respectfully pray that this Court reverse the judgment of the Tenth Circuit and remand the case with directions to dismiss the case.

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APPENDIX

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Excerpts from Transcript and Summary of Testimony in the United States District Court for the District of New Mexico

The district court found as a fact that the Santa Clara Pueblo has been and remains a patrilineal and patrilocal society. 402 F. Supp. at 16. We have complained in the preceeding brief that the court of appeals set this finding aside as a mere conclusion. Below are excerpts from the transcript and references to quotations from the testimony showing the substantial evidentiary basis on which the district court, as fact-finder, acted.

Examination of the record reveals no contradictory evidence.

The Governor of the Santa Clara Pueblo, Mr. Paul Tafoya, was the first tribal official to testify to the rationale underlying the gender-based classification in the 1939 citizenship ordinance:

> A. It was my understanding, in discussing these matters with the old people, that this was a rule that was carried on and it was my understanding that in the year 1939, it surfaced and, at that time, it became a written guideline.
>
> Q. Was the rule, as far as you know, that way prior to 1939?
>
> A. It was my understanding that it was. It was my understanding, through the people that I discussed this matter with, it was my understanding that's the way it was before the Constitution was adopted.
>
> • • • •
>
> Q. Governor, would you explain to the Court the difference in the status of a male in a Pueblo society as compared to that of a female in the religious privileges?

A. [Governor Tafoya explained that he was prohibited from discussing the particulars of the Santa Clara religious practices in public.]

But I can state one thing: That the male Santa Clara Indian truly has that responsibility to teach and train and expose his family to the way of the Indian people, and this involves quite a bit within the Indian culture.

Now, I'm talking about the Santa Clara Indian culture and it is his responsibility, much more than it is the responsibility of a female member of the tribe.

Transcript, at 108-09.

Governor Tafoya explained that, "In the Santa Clara Pueblo, the male is always considered the head of the house." Transcript, at 110. It is the male (if not the husband, then an uncle or a cousin) "that passes down such traditions, customs from generation to generation." Transcript, at 115. Historically, when a Santa Claran female married a non-Santa Claran, "according to the older people on the reservation, they usually traveled with their husbands." Transcript, at 115.

Finally, Governor Tafoya was asked:

Q. In your opinion, what would happen to the Santa Clara culture if you quit enforcing the Ordinance of 1939?

A. It would tend to destroy the Pueblo as a whole because there would actually be no Government, no organization . . . .

Without it, we would have an influx of people that we don't know who they are. They would come in from all directions; Indians and non-Indians alike.

So, it would be a destruction on the Santa Clara Indian culture.

• • • •

Q. What is your prime concern insofar as this lawsuit is concerned?

A. My prime concern, as far as this lawsuit is that we like to keep our Government. We like to be a responsible people. We know what our community is all about.

We know the people, the traditions and customs, the ceremonies, the religious life, the entire thing that makes the Indian and his way of life. That is, to me, is very important.

Membership, at this point in question, is very important. I think the community is concerned very much so about the general membership of the tribe, and I am sure that, eventually, they will work out their own problems.

Transcript, at 116-17.

During crossexamination, the Governor indicated that there has been no naturalized citizens admitted to the Pueblo since the 1939 ordinance became law. Transcript, at 118. When asked whether the 1939 ordinance is essential, he replied:

This is the only way we can protect and preserve our culture. If we let outside influences come in, that would tend to destroy what we now have. Then what's the sense of having a Tribal Government?

Transcript, at 140. Then why, Governor Tafoya was asked, did the Pueblo allow non-Indian wives' children to be enrolled? Isn't that an outside influence? To which the Governor simply replied:

> It is, but, again, I repeat, it is still the responsibility of the male member, who is the head of the family, it is his responsibility to teach his people the Indian way of life.

Transcript, at 140.

During his redirect examination, Governor Tafoya was asked for the Pueblo's rationale behind allowing the children of Santa Claran mothers who are born out of wedlock to become tribal members:

> I think the primary concern behind it is the fact that they have no other place to go, that we do recognize them to be half Santa Clara on the mother's side, not truly knowing who the father will be.
>
> But in this case, because they have no other land, they have no other tribe to go to, they have no father, and, therefore, or they may have a father but not knowing who the father is, but the fact is that we are responsible for our people and, in this respect, we do open membership to them.

Transcript, at 145. Governor Tafoya explained that even the mother of an illegitimate child does not assume the responsibility of teaching the child; this role is assumed by the *male* members of the mother's family. Transcript, at 145.

Mr. Jose Gene Naranjo, Community Director at Santa Clara since 1968, was Secretary under the Constitution in 1936, the first year of its operation. Transcript, at 151. Mr. Naranjo explained that the gender-based distinction in the 1939 ordinance had been "handed down from generation to generation. So it was there long before the Constitution was even thought of." Transcript, at 153. The rationale underlying this rule was explained to Mr. Naranjo by his uncles, who were past-Governors of the Pueblo:

> Well, they have always said that the man is the head of the family; anytime he takes a wife, well, that's his responsibility. That's his responsibility to take care, to provide, to protect the wife that he takes, and wherever he's from, if he's from the Pueblo, that's where he stays unless he wants to get on.
>
> If he is from outside, well, there's where he should have taken his wife.

Transcript, at 155. It was the usual case for Santa Claran women who married outsiders to live off the reservation in their husband's homes. Transcript, at 156. Mr. Naranjo explained the reason for the 1939 ordinance thusly:

> Well, the 1939 Ordinance, I guess, was due to the fact that they have seen more and more outside marriages coming into the tribe, and for that reason, they thought they would have problems with the mixed marriages, with the children. So that's the reason this was stopped.

Transcript, at 155.

Similarly, Mr. Amerante Silva, Director of Social Services of the Santa Clara Pueblo, gave this reason for the 1939 ordinance:

> [T]he man was considered the head of the household and he has the sole responsibility, and then on the basis of the outsiders coming through, coming in, no, that was one of the bases, I'm sure, that the elders at that time foresaw that thing that was coming in, so that was the closing of that, or the making of that Ordinance.

Transcript, at 186. Mr. Juan Chaverria, a resident of Santa Clara and a former Governor of the Pueblo, also indicated that the distinction under challenge "always

has been the rule of the tribe since immemorable." Transcript, at 208. The rule governing the citizenship of illegitimates also "has been practiced for years and years, for generations and generations." Transcript, at 211.

The testimony of the above members of the Santa Clara Pueblo was corroborated by the expert study and opinions of Dr. Florence Hawley Ellis, Professor Emeritus of Anthropology, University of New Mexico. The U.S. Department of Justice had requested Dr. Ellis to write a brief report on the Santa Clara Pueblo in connection with this suit, before the Secretary of Housing and Urban Development was dismissed as a party. Transcript, at 231. Although Dr. Ellis testified for the Pueblo, her research was not done at the request of the Tribe. Transcript, at 231. Dr. Ellis's paper, "Santa Clara Social Organization and Citizenship," was introduced into evidence as Plaintiff's Exhibit No. 1.

Dr. Ellis's research indicated that, in Santa Claran rules governing citizenship, "[t]he principle considered to be fundamental to those regulations was that a man, especially in the Tewa system but also within that of the more matrilineally oriented Keresan pueblos of the Rio Grande and of Zuni farther to the west, was looked upon as head of the family." Plaintiff's Exh. No. 1, at 25. This principle interacted with the jealous manner in which Santa Clarans guarded their unique identity to form the general rules governing the Pueblo. *See* Transcript, at 236-37. First, marriage should be made within the Pueblo. Plaintiff's Exh. No. 1, at 25. However, to the considerable concern of the tribal elders, some mixed ma.riages did occur. *Id.* at 25-26. Dr. Ellis found:

> [B]ased upon the Pueblo concept of the male being head of the family, functionally, an idea encouraged by Spanish American and Anglo neighbors, was that

> a man who married outside his tribe should take his wife home to his own tribe and area and his children should be enrolled as members of his tribe. This plan followed the patrilineal emphasis in Tewa moiety membership . . . .

Id. at 26. Santa Clara recognized a corolary to the above-stated rule when the outsider wished for his family to live at the Pueblo: "Whenever a person had lived in the pueblo for some years and had made his contribution by participating in community work when the period for such tasks as cleaning the plazas, opening the irrigation ditches, and plastering the church was announced by the governor, his name could be brought up by someone in a council meeting and he could be accepted as a pueblo member . . . ." *Id.* However, this possibility of naturalization obtained only during the "old days" when mixed marriages were uncommon. *See id.* at 29.

In her paper, Dr. Ellis drew a crucial distinction. The Santa Claran system does not discriminate against males or females, but rather distinguishes clearly between the roles each sex is expected to perform in the Pueblo. "I have never heard an adult Pueblo woman complain of being downtrodden, and my own observations since the late 1920's have persuaded me that in the Pueblo social system women held a higher position than in our own." Plaintiff's Exh. No. 1, at 29-30. Dr. Ellis explained:

> Division of labor and responsibilities by sex, however, is pronounced: this is not a matter of inequality but of specialization between the sexes in certain categories of group activities. Men were considered to be the heads of families. In the past young people were advised to marry inside the pueblo.

Id. at 32.

Dr. Ellis summarized her findings as follows:

> Following the concept of sex specialization, men run the Tewa religious system. Women, with one single exception, are assistants in this line. Concomitantly, men run the political system and women characteristically know little about what is going on. Women, however, are very important in economics and enjoy individual ownership of various things, do much of the purchasing, may be the family bankers, and are expected to speak in relation to use of moneys.
>
> During the 95 years covered by our reports on the Tewa, no major changes in social organization took place. The two major developments in the Santa Clara system consisted of the formalization of two factions per moiety, with their leaders, and introduction of a voting system for secular officers. The constitution was largely a written statement of older customs pertaining to secular government.

Id. at 33.

At trial, Dr. Ellis concluded:

> Q. Doctor, in your opinion, based upon your studies and readings and persoral observations, and the testimony that you have given here today, if Santa Clara allowed their women to marry non-Santa Clarans, and if their children became members, do you foresee any possible results from this.
>
> A. Well, because of the importance of men in connection with the carrying on of the culture, the training of the children in the socio-religious situations, the culture eventually would break down and be lost.

Transcript, at 251.